United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MAY 22 2006

IN REPLY REFER TO:

MEMORANDUM

To: Nina Hatfield, Deputy Assistant Secretary, Business Management and Wildland Fire

From: David Bernhardt, Deputy Solicitor

Subject: Request for Legal Opinion Regarding Principles of Fiscal Law as They Apply to the Operations of the Department of the Interior Franchise Fund

This responds to your request of April 21, 2006, that our office address four questions posed by Department of the Interior and Department of Defense Inspectors General under their joint review of DOD interagency contracting actions. The Inspectors General cite instances in which the Interior Franchise Fund (IFF) has received time-limited DOD funds for purchases made in subsequent fiscal periods. They characterize our office's opinion, dated August 26, 2003, as stating that, if time-limited funds are obligated through a transfer to the IFF during their period of availability, then the IFF "may retain any unexpended funds for expenditure after the expiration of their period of availability." While generally correct, this conclusion is subject to the qualification, also expressed in our 2003 opinion, that funds obligated during their period of availability must relate to a *bona fide* need of that period.[1]

The Government Management Reform Act of 1994 (GMRA), Pub. L. No. 103-356, Title IV, § 403, 108 Stat. 3410 (1994), as amended, authorized the Office of Management and Budget (OMB) to establish franchise funds in six Federal agencies. In 1996, OMB selected Interior as one of the six franchise fund agencies. Interior's 1997 Appropriations Act, Pub. L. 104–208, Div. A, Title I, § 101(d), as amended, established the IFF. At that time, prior to its recent move from the Minerals Management Service to Interior's National Business Center (NBC), within the Office of the Secretary, GovWorks became Interior's designated IFF activity, performing common administrative services on a service-for-fee basis for Interior components and for other Federal agencies.

In August 2003, the Government Accountability Office (GAO) issued Report No. GAO-03-1069, *Franchise Fund Pilot Review* (Report), to aid Congress in deciding whether to

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[1] *See* opinion of August 26, 2003, at 5, citing *Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course*, 70 Comp. Gen. 296, 297 (1991). The thrust of our 2003 opinion was to distinguish interagency agreements subject to the Economy Act, 31 U.S.C. § 1535, from those made under another statutory authority. When interagency agreements are made under authority other than the Economy Act (such as the IFF authority), unexpended funds need not be deobligated at the end of their period of availability if obligated during that period. *See National Park Service Soil Surveys*, B-282601, Sept. 27, 1999; GAO *Principles of Federal of Appropriations Law 3rd Ed.*, Vol. II, 7-30 and 7-31 (GA0-06-382SP).

reauthorize the six GMRA franchise funds. The GAO examined not only the GMRA franchise funds, but all intergovernmental revolving (IR) funds of which the "franchise funds are a type." Report at 1. The GAO noted that, unlike under the Economy Act, "specific legal authorities creating IR funds authorize these funds to enter into intragovernmental transactions and *provide more flexibility by allowing the client agency's fiscal year funds to remain obligated, even after the end of the fiscal year, to pay the IR fund for the provision of services which meet a legitimate or bona fide need incurred during the period of availability* of the customer agency's appropriation." Report at 2-3; 15 (emphasis added).

In general, we do not believe that the questions raised by the Inspectors General pose novel legal questions under existing appropriations laws and guiding principles as articulated by the GAO. It is against this background of established law and guidance that we respond to the questions, in turn, as follows:

1. Whether the IFF may accept funds from another agency if a specific *bona fide* need is not identified and articulated contemporaneous with the transfer of such funds? Please explain.

For the ordering agency to ensure that, when transferred to the IFF, its funds are properly obligated during their period of availability and will, accordingly, remain available for expenditure thereafter, the ordering agency must identify a *bona fide* need of that period. Much has been written explaining the applicability of the *bona fide* needs rule, and it need not be restated here. Rather, we assume for purposes of this discussion that the ordering agency seeks the assistance of the IFF to meet a *bona fide* needs that arose during the period of availability of its funds. If the IFF merely accepted funds from the ordering agency with no identified *bona fide* need, this would not constitute an obligation.

In order to obligate funds during their period of availability, the ordering agency need not define its *bona fide* needs with the same degree of specificity that the IFF ultimately may define the work in the final, definitized contract that fulfills the ordering agency's requirement. *See* GAO *Principles of Federal of Appropriations Law, Vol. II, 3rd Ed.*, at 7-11 (GAO-06-382SP). Although the proposed transaction must meet one or more of the nine criteria under the recording statute, 31 U.S.C. § 1501, to constitute a recordable obligation, the level of specificity required to create the obligation itself is not defined. Rather, this is analyzed on a case-by-case basis. *Id.*, 7-3 through 7-6. Similarly, the ordering agency needs only transfer to the IFF a reasonable estimate of the total project cost, including the IFF service charge. *Id.* at 7-8 and 7-9 ("where the precise amount [of the liability] is not known at the time the obligation is incurred, the obligation should be recorded on the basis of the agency's best estimate")(brackets added). Just as a larger amount may first be transferred under an IFF agreement (which is the obligating event), the final obligation is more precisely tuned when the actual cost of the requirement becomes known after the IFF awards the resulting contract. *Id.* at 7-9.

Subsection (a) of the recording statute, 31 U.S.C. § 1501, was enacted so that executive agencies would no longer record questionable obligations based upon alleged oral contracts. *National Institute of Standards and Technology—Use of Electronic Data Interchange Technology to Create Valid Obligations*, 71 Comp. Gen. 109, 113 (1991) (citing 51 Comp. Gen. 631, 633 (1972)).[2] This subsection created minimum standards to give Congress "reliable information in the form of accurate obligations on which to determine an agency's future requirements." *Corporation for National and Community Service: Amount of Obligations*, B-300480.2, June 6, 2003 (citing S. Doc. 11, 87th Cong., 1st Sess. 85 (1961)).

An agency incurs an obligation when it incurs "a definite commitment which creates a legal liability of the government for the payment of appropriated funds." B-116795, June 18, 1950. This can include "where the agency has agreed to assume responsibility in an interagency agreement." *Obligational Practices of the Corporation for National and Community Service*, B-300480, April 9, 2003. It also includes a "legal duty on the part of the United States which . . . could mature into a legal liability by virtue of actions on the part of the other party." *Principles of Federal of Appropriations Law, Vol. II, 3rd Ed.* at 7-3 and 7-4; *Obligational Practices of the Corporation, supra* (citing 42 Comp. Gen. 733, 734 (1963)); *see also Corporation for National and Community Service, supra* ("[i]f the amount of payment is under the control of the grantee, not the government, the government should obligate funds to cover its maximum potential liability").

Under the Government Management Reform Act of 1994 (GMRA), the IFF must follow all applicable procurement laws. *See* GMRA, Pub. L. 103-356, Title IV, § 403(e), 108 Stat. 3410 (1994), as amended. This includes adherence to the Federal Acquisition Regulation, 48 C.F.R. Ch. 1, Part 1, *et seq.*, which reflects the guidance of numerous Federal procurement statutes. *See, e.g., Federal Property and Administrative Services Act of 1949*, Pub. L. 81-152, as amended (principally codified with respect to procurement at 41 U.S.C. Chapter 4) and the *Armed Services Procurement Act of 1947*, as amended, Ch. 65, 62 Stat. 21.[3] Not surprisingly, the requirement of the ordering agency as reflected in the resulting IFF procurement will not be precisely the same as in the *bona fide* needs statement set forth in the interagency agreement. Indeed, GAO has recognized that a requirement may remain relatively undefined but still meet the *bona fide* needs rule. *See, e.g.*, B-235678, July 30, 1990 (two-year R&D appropriation was available to

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[2] "Section 1311 [predecessor to § 1501] was designed to remedy the then-existing practice of some agencies to avoid the withdrawal and reversion of appropriated funds remaining unexpended at the end of their period of availability by adopting strained and diverse concepts of obligation, thereby making it difficult for the Congress to distinguish those items which truly deserved to be treated as obligations. *See* H. Rep. No. 2266, 83d Cong., 2d Sess. 49-50; 100 Cong. Rec. 11476 (1954). The remedy was accomplished by establishing specific standards for the determination of valid obligations, and by requiring that agency reports of obligations conform to these standards." 51 Comp. Gen. 631, 633 (1972)(brackets added).

[3] These statutes are the Federal procurement framework for civilian and military agencies, respectively, which are affected by and also incorporate numerous ethical (*e.g., Copeland Anti-Kickback Act*), workplace and labor (*e.g., Davis-Bacon Act*), socioeconomic (*e.g., 8(a) program, Buy American Act*), environmental (*e.g., National Environmental Policy Act, Clean Water Act*), and procedural requirements (*Competition in Contracting Act of 1984*, Pub. L. 98-369, as amended (41 U.S.C. §§ 253 *et seq.*); *Contract Disputes Act of 1978*, Pub. L. 95-563, as amended (41 U.S.C. §§ 601-613)).

pay for work following period of availability under level-of-effort contract, an "arrangement dependent on the government's inability to define the needed work in advance"). In this regard, GAO recognizes that one kind of obligation—an "unmatured commitment"—is a liability "which is not yet payable but for which a definite commitment nevertheless exists." *Principles of Federal of Appropriations Law, Vol. II, 3rd Ed.* at 7-4. This is what occurs when an ordering agency transfers funds estimated to cover both its requirement and the IFF's service charge.

Absent a "bright-line" test for what constitutes an obligation under 31 U.S.C. § 1501, an interagency agreement need only be specific enough to create "a definite commitment" between the ordering agency and the IFF. The IFF's ultimate fulfillment of the agency's requirement often will be more definitized than in the interagency agreement, especially, for example, in the case of a performance-based services acquisition. It is prudent fiscal practice for the ordering agency to transfer to the IFF, and to record as an obligation during the funds' period of availability, a reasonable estimate of the total cost of the requirement including IFF's service charge.[4] That which is ultimately not expended in fulfilling the requirement, net of IFF's service charges, should be returned to the ordering agency or transferred to the Treasury. In this regard, we understand that the IFF has detailed business processes in place to identify unused funds to be deobligated and returned to the ordering agencies or to the Treasury.

2. Whether time-limited funds transferred to the IFF, but not identified with a *bona fide* need contemporaneous with such transfer, lose their character and become "no-year" funds expendable at any time in the future, without regard to source agency fiscal year limitations? Please explain.

This question is similar to the one posed by Interior's Inspector General on August 13, 2003: "When unexpended fiscal year appropriations of a customer agency are transferred to the Department's no-year franchise fund, do the appropriations lose their fiscal limitation and become no-year funds?" In our response of August 23, 2003, we refined the question, as we do again here, to be: "When a federal agency obligates limited period funds under an interagency agreement with GovWorks during the period of their availability, may unexpended funds remain available for expenditure by GovWorks after the expiration of their period of availability?" The answer generally is "yes." We have not contended that GMRA or its implementing IFF authority converts an ordering agency's limited-period funds into "no-year" money. There is a meaningful distinction between the unlimited availability of "no-year funds" and the limited, but still undefined, time necessary to expend funds properly obligated via the IFF.

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[4] The Department of the Interior Appropriations Act, 1997, Pub. L. 104–208, Div. A, Title I, §101(d), as amended, established the IFF and provided that " such fund may be reimbursed or credited with the payments, including advanced payments, from applicable appropriations and funds available to the . . . other Federal agencies for which such administrative and financial services are performed, *at rates which will recover all expenses of operation . . . and an amount necessary to maintain a reasonable operating reserve, as determined by the Secretary . . .*" (Emphasis added).

As discussed above, time-limited funds not obligated during their period of availability are unavailable for obligation. When properly obligated, however, the portion of the fees charged by the IFF to acquire goods and services on behalf of the ordering agency is available to pay expenses incurred for a *bona fide* need of the period of availability of those funds. Obligated monies remain available for "recording, adjusting, and liquidating obligations properly chargeable to that account" for a period of five fiscal years following the close of the fiscal period of availability. *See* 31 U.S.C. §§ 1552(a) and 1553(a). As noted above, monies ultimately not expended in fulfilling the ordering agency's requirement, net of IFF's service charges, are returned to the ordering agency or transferred to the Treasury.

Just as there is reasonable flexibility in what constitutes an obligation, there is significant flexibility for cross-year expenditure of timely obligated limited-period funds. The *bona fide* needs rule provides that an agency may obligate funds to meet a legitimate need arising in the fiscal year for which the appropriation was made, regardless of when the work is actually performed. 70 Comp. Gen. 296, 297 (1991); 65 Comp. Gen. 741, 743 (1986)(study that was a *bona fide* need of FY '84 but not completed until FY '88 was properly funded with FY '84 funds). Once limited-period funds are obligated, they remain available for expenditure until the obligation is liquidated. *United States Fish and Wildlife Service – Installment Payments for Real Property*, 56 Comp. Gen. 351, 352 (1977)(real property purchase options in which price was to be paid over four years properly payable from funds current at time of option exercise). If funds are properly obligated during their period of availability to meet a need of that year, then the "timing of the actual expenditure of the funds is . . . irrelevant." *Id.*

In contrast to funds obligated for the requirement itself, the IFF's service charges lose their fiscal year identity and may be used without regard to the time limitations that apply to the ordering agency. *See, e.g., Implementation of the Library of Congress FEDLINK Revolving Fund*, B-288142, Sept. 6, 2001, at 4 (distinction made between "advances the customer agency provides . . . to cover the customer's order for goods and services" and "reimbursements to the Library for the accounting services and its other administrative costs," which may be used without fiscal year limitation).

3. If time-limited funds lapse, but are nonetheless expended by the IFF for DOD purchases, does an Anti-Deficiency Act violation occur, and if so, does this violation accrue against one, or both agencies? Please explain.

Within the context of our answers to Questions 1 and 2, above, the IFF may expend funds to liquidate obligations incurred under contracts that the IFF awards either before or after the close of the relevant fiscal period of availability, so long as those funds were obligated before the close of the fiscal period of availability. Thus, for purposes of this discussion, we cannot accept the premise that period of availability of the funds has lapsed.[5] Moreover, the GAO has held that every violation of the *bona fide* needs rule

[5] In addition to the general principle discussed in our response to Question 2 that once limited-period funds are obligated, they remain available for expenditure until the obligation is liquidated, GAO has held that where fulfillment of a contract made in an earlier fiscal year requires cost increases in later

does not necessarily also violate the Antideficiency Act. *See* B-235086.2 (January 22, 1992). As discussed above, assuming that the ordering agency timely and properly obligated its funds by placing an order with the IFF, no Antideficiency Act violation would occur.

Finally, even if after a thorough consideration of the circumstances and available authorities, it were determined that an obligation was purportedly made to the wrong fiscal year's appropriation, there would be no Antideficiency Act violation unless the appropriation account to be properly charged did not have enough money to permit an adjustment. *See, generally, Principles of Federal of Appropriations Law, Vol. II, 3rd Ed.*, at 6-34 through 6-38. That is, it simply would be premature to equate improperly charging an unavailable appropriation with an Antideficiency Act violation until it is definitively known whether there is insufficient funding in the proper appropriation to make an adjustment. *Id.* [6]

4. If the DOD Comptroller determines that time-limited funds were improperly retained by the IFF and spent after they expired, what fiscal liability, if any, does the IFF have with respect to such funds? Please explain.

Generally speaking, as noted above, the IFF retains and expends funds in reliance upon representations made by the ordering agency with respect to the purpose and availability of the transferred funds and description of the requirement. While the IFF cannot accept funds transferred under an interagency agreement containing a patently inadequate *bona fide* needs statement, ultimate responsibility for the proper expenditure of an ordering agency's appropriation most properly lies with the accountable officers of that agency. *See* B-235678, July 30, 1990, 1990 U.S. Comp. Gen. LEXIS 1376 at *12 ("it is the nature of the work being performed . . . that must be taken into account in reaching a judgment on [the *bona fide* needs] issue. That judgment is . . . in the first instance, the responsibility of the [agency]")(brackets added). The IFF is simply not in a position to look behind every *bona fide* needs statement presented by the ordering agencies, and we do not believe it should bear fiscal liability in the absence of causal actions.

I trust that this information has adequately responded to your request. Please call Alton Woods or Jim Weiner at (202) 208-6201 if you have any additional questions.

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years, these costs may properly be charged to the appropriation funding the original contract. *Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase*, 65 Comp. Gen. 741, 744 (1986); 31 U.S.C. § 1553(a)(unobligated funds remain available for up to five years to cover appropriate adjustments for obligations in an expired account.). By the same token, in-scope contract modifications occurring in a fiscal year subsequent to the year of the original contract are considered *bona fide* needs of, and chargeable to, the appropriation funding the original contract. 61 Comp. Gen. 609 (1982).

[6] Furthermore, statutes such as 41 U.S.C. § 253*l* (for civilian agencies) and 10 U.S.C. § 2410a (for DOD), provide authority for cross-fiscal year contracting for severable services that otherwise might be inappropriate under the *bona fide* needs rule. *Principles of Federal of Appropriations Law, Vol. I, 3rd Ed.*, at 5-44. Among additional authorities available to DOD are 10 U.S.C. §§ 2306b and 2306c, permitting obligation of appropriations available in the year of contract award for a period of up to five years in appropriate circumstances (*see also* 41 U.S.C. § 254c). *Id.* at 5-45 through 5-47.